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No. 03-02

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In the
Supreme Court of the United States

OXFORD ASSET MANAGEMENT, LTD., and SUSMAN & WATKINS,

Petitioners,

v.

MICHAEL JAHARIS, DANIEL M. BELL, DUNCAN H. COCROFT, JUAN F. RODRIGUEZ, ROBERT E. BALDINI, JOHN BRADEMAS, STEVE JAHARIS, LOUIS LASAGNA, MARK NOVITCH, FREDERICK B. WHITTEMORE, KOS PHARMACEUTICALS, INC., COWEN & COMPANY, DONALDSON LUFKIN & JENRETTE, SALOMON SMITH BARNEY HOLDINGS, INC., SBC WARBURG, DILLON, READ, INC., individually and as representatives of THE CLASS OF UNDERWRITER DEFENDANTS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONERS' REPLY BRIEF

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The Petition should be granted for all of the reasons stated therein. For purposes of clarity, Petitioners respectfully submit the following limited response to the Underwriters' discussion of Oxford's material omission claim.

Oxford's claim in the district court was that: (a) Kos had approximately seven weeks of Niaspan prescription data at the time of the Secondary Offering (R.1, ¶ 53), (b) the data in Kos's possession indicated that Niaspan was not "a commercially viable product" (R.1, ¶ 61; R.57, pp. 8-9), which, in turn, showed that the Secondary Offering share price was unsupportable; and (c) Kos nonetheless failed to disclose that material data to the public at the time of the Secondary Offering.[1] Although that claim met the notice pleading standard of Fed. R. Civ. P. 8(a), Oxford provided additional factual detail as to the materiality of the omitted data, further pleading that: (1) an analyst for Salomon issued a report concluding that the Niaspan prescription data, almost all of which Kos possessed at the time of the Secondary Offering, showed that Niaspan was a commercial failure, and (2) once the adverse prescription data was disclosed by Salomon, the share price collapsed. (R.1 ¶¶ 52-53, 61; R.57, pp. 8-9.)

The Underwriters offer two fact-based attacks on Oxford's material omission claim. *First*, the Underwriters take Oxford to task for stating in its Petition that the omitted sales data undercut the Prospectus's "earnings estimates," pointing out that the Prospectus did not actually contain any "earnings estimates" *per se*. (Underwriters' Br. at 4.) Strictly speaking, the Underwriters are correct in

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[1] Respondents allege that Oxford did not raise its material omission theory until oral argument on their Motion to Dismiss. (*E.g.*, Underwriters' Br. at 7.) That is incorrect. In both its Complaint and its Response to Kos's Motion to Dismiss, Oxford alleged that Kos withheld material prescription data. (*E.g.*, R.1, ¶¶ 52-53, 61; R.57, pp. 8-9.)

criticizing the precise words which the Petition uses to describe Oxford's claim below. More accurately, Oxford argued below that the data omitted by Kos demonstrated that the *share price* for the Secondary Offering (which necessarily reflects Kos's estimate of future performance), rather than any express "earnings estimate," was unsupportable. However, the Underwriters' criticism of Oxford's word choice is beside the point. The Kos Prospectus unquestionably represented that its *only* product had commercial value. Yet, as Oxford properly pleaded, Kos knew otherwise before the closing of the Secondary Offering: Kos possessed via its own sales force, but did not disclose, seven weeks of material prescription data, showing that its sole product was a commercial failure. The Eleventh Circuit's decision to dismiss that claim—despite acknowledging the materiality of the omitted data—is both contrary to the Rule 8 pleading standard applicable to such claims and conflicts with the decisions of other circuits.

Second, Respondents quibble with Oxford's use of the Salomon Report. According to the Underwriters, the Salomon Report was an "independently" conducted analysis and Salomon's earnings estimates were not "endorsed" by the Prospectus. (Underwriters' Br. at 5.) Characterizing the Salomon Report as an "independent" analysis is not entirely accurate. After all, Salomon was a lead underwriter of Kos's Secondary Offering, was named as a defendant below, and is a respondent in this Court. At all events, Respondents' attempt to disassociate themselves from the Salomon Report is irrelevant and misstates Oxford's omission claim. Oxford's claim is not based on the Salomon Report, and it does not rise or fall on whether Kos disclosed Salomon's data or "endorsed" Salomon's revenue estimates. Rather, Oxford's claim against Kos is squarely based on *Kos's failure to disclose its own data*. The fact that one of the Respondents' own employees considered substantially the same data to be material, and that Kos's

share price collapsed as soon as that data was disclosed, merely provides factual support for Oxford's omission claim.

Respondents' discussion of Oxford's material omission claim and its use of the Salomon Report do not show that this case is inappropriate for review. Contrary to Respondents' assertions, review of the decision below does not require this Court to become entangled in any factual disputes. Rather, the Eleventh Circuit's decision squarely places before this Court the important, purely legal questions presented in Oxford's Petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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